# WISCONSIN SUPREME COURT
# CALENDAR AND CASE SYNOPSES
# FEBRUARY 2017

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Dane
Eau Claire
Lafayette
Milwaukee
Outagamie
Ozaukee
Rock

**WEDNESDAY , FEBRUARY 15, 2017**

| | | |
|---|---|---|
| 9:45 a.m. | 14AP2701-CR | State v. Robert Joseph Stietz |
| 10:45 a.m. | 15AP231 | John Krueger v. Appleton Area School Dist. Bd. of Education |

**FRIDAY, FEBRUARY 17, 2017**

| | | |
|---|---|---|
| 9:45 a.m. | 15AP671-CR | State v. Keimonte Antonie Wilson, Sr. |
| 10:45 a.m. | 15AP1452-CR | State v. Gary F. Lemberger |
| 1:30 p.m. | 16AP275 | Hon. William M. Gabler, Sr. v. Crime Victims Rights Bd. |

**TUESDAY, FEBRUARY 28, 2017**

| | | |
|---|---|---|
| 9:45 a.m. | 15AP993-CR | State v. Heather L. Steinhardt |
| 10:45 a.m. | 15AP1782-CR | State v. Sambath Pal |
| 1:30 p.m. | 15AP1493 | The Segregated Acct. of Ambac Assurance Corp. v Countrywide Home Loans, Inc. |

***Note:*** The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Rev. 2-8-16

**Wisconsin Supreme Court**
**9:45 a.m.**
**Wednesday, February 15, 2017**

2014AP2701-CR State v. Stietz

**Supreme Court case type:** Petition for Review
**Court of Appeals:** District IV
**Circuit Court:** Lafayette County, Judge James R. Beer, affirmed
**Long caption:** State of Wisconsin, Plaintiff-Respondent, v. Robert Joseph Stietz, Defendant-Appellant-PETITIONER.

**Issues presented:** Petitioner Robert Joseph Stietz presents the following issues to the Supreme Court:

- Did the Court of Appeals deny Stietz's federal and state constitutional rights to present a complete defense of self-defense by weighing his credibility and requiring more than "some evidence," even if inconsistent, to support a self-defense instruction?
- Did the Court of Appeals deny Stietz's federal and state constitutional rights to present a defense by forbidding arguments that Stietz was defending himself against two men he reasonably believed were armed trespassers?
- Did the Court of Appeals contradict the Supreme Court's decision in State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), by foreclosing a self-defense claim against wardens who Stietz did not know were law enforcement officers; were not claiming to make an arrest but were only trying to disarm a man without apparent right; and were not acting peaceably in any event but were trying to violently disarm a lawfully armed man?

**Some background:** Stietz was originally charged with first-degree reckless endangerment, negligent handling of a weapon, two counts of resisting a law enforcement officer while threatening to use a dangerous weapon, and two counts of intentionally pointing a firearm at a law enforcement officer. He was convicted after a jury trial of resisting a law enforcement officer and intentionally pointing a firearm at an officer.

The charges arose out of a confrontation between Stietz and two Department of Natural Resources (DNR) conservation wardens, Joseph Frost and Nick Webster. Stietz was accused of pointing and holding a handgun at the wardens after they confronted him in a field for possibly hunting deer after allowable hours.

Stietz's pretrial motion to dismiss the charges based on his Second Amendment rights was denied following a hearing.

The wardens testified that they went looking for hunters who may have been hunting after hours after they had spotted hunting items in Stietz' vehicle parked along a fence line.

When Stietz was about 20 yards away from them, Frost turned on his flashlight and each warden identified himself as "Conservation Warden" in a voice "loud enough to be heard pretty well." Webster asked Stietz if he had seen any deer. Stietz, who was armed with a rifle, said he had seen seven doe. Stietz told the wardens he was not hunting but was looking for trespassers.

As Stietz walked toward the two wardens, Frost noticed a gun in Stietz's right front pocket and alerted Webster of this fact. Webster testified Stietz "went from holding his gun off

to the side and then turned his gun facing straight on as I was approaching him, which is unusual."

When the wardens and Stietz were "within arm's reach" of each other, Webster asked Stietz if the rifle was loaded and Stietz said it was. After Stietz twice denied the wardens' requests to see the rifle, Frost became concerned for his and Webster's safety.

In a struggle for the rifle, Frost ended up with the rifle in his hands, lying on his back. When Stietz reached for his handgun, Webster drew his own handgun and Frost threw the rifle aside and drew his handgun as well.

As Frost stood up, Stietz continued to point his handgun in Webster's direction. For the next 10 minutes the wardens unsuccessfully tried to convince Stietz to lower his weapon, but it was not until a sheriff's deputy arrived on the scene that Stietz lowered the handgun.

Stietz testified at trial that he had been walking his fenced-in property looking for trespassers when he encountered two strangers clad in blaze orange. Stietz testified when he refused to give the strangers his rifle, they forcibly wrestled it away and when one of the strangers drew a pistol on Stietz, he responded in kind. Stietz claimed he feared for his life and had acted in self-defense to protect himself. Stietz sought a self-defense jury instruction, but the request was denied.

The circuit court denied Stietz's post-verdict motion for acquittal or a new trial. The court imposed a four-year sentence consisting of one year of initial confinement and three years of extended supervision on the intentionally pointing a firearm at an officer charge. The court withheld sentence on the resisting conviction and imposed a consecutive two-year probation term.

Stietz appealed, and the Court of Appeals affirmed. On appeal, Stietz argued that the circuit court erred when it denied his request for a self-defense jury instruction. The Court of Appeals noted that although Stietz testified he did not know Frost and Webster were wardens until Webster called the sheriff's department for backup, Stietz' testimony indicated that when the wardens first approached one "looked at him and said a Warden, but it was kind of mumbled. . . ." Stietz also testified that "one kind of said, Green County," while "the other one looked at him and said something warden."

**Wisconsin Supreme Court**
**10:45 a.m.**
**Wednesday, February 15, 2017**

2015AP231 Krueger v. Appleton Area School Dist. Bd. of Ed.

**Supreme Court case type:** Petition for Review
**Court of Appeals:** District III
**Circuit Court:** Outagamie County, Judge Vicki L. Clussman, affirmed
**Long caption:** State of Wisconsin ex rel. John Krueger, Plaintiff-Appellant-PETITIONER, v. Appleton Area School District Board of Education and Communication Arts 1 Materials Review Committee, Defendants-Respondents-RESPONDENTS

**Issues presented:**

- Whether a formal committee, created by school district officials, pursuant to school district policies, in order to carry out school district functions, is a "governmental body" subject to the Open Meetings Act.
- Whether the Court of Appeals properly struck a portion of John Krueger's reply brief.
- Whether, if the committee is a "governmental body," it met in violation of the Open Meetings Act.

**Some background:** Wisconsin's Open Meetings Law, Wis. Stat. § 19.82(1), only applies to "governmental bodies," which are statutorily defined as any "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order."

This case examines what the terms "rule or order" mean, and specifically whether the Appleton Area School District Board of Education and Communication Arts 1 Materials Review Committee was created by "rule or order," such that it was subject to the Open Meetings Law.

Krueger pays taxes in the Appleton School District, and his son attends a district school. In July 2011, Krueger requested that the district provide an alternative ninth-grade Communication Arts 1 course due to concerns with the course reading materials. Krueger wanted the alternative course to use books that contained no profanity, obscenities, or sexualized content.

Lee Allinger, the superintendent of the school district, asked two members of the school district's Assessment, Curriculum, and Instruction Department – Kevin Steinhilber and Nanette Bunnow –to respond to Krueger's concerns. The superintendent did not direct Steinhilber and Bunnow to use any particular process in responding to Krueger's concerns.

Steinhilber and Bunnow ultimately decided to conduct a review of the existing Communications Arts 1 books to determine whether different books, as opposed to an entirely new course, would resolve Krueger's concerns. They formed the review committee to conduct the book evaluation. Steinhilber and Bunnow expanded the review committee's duties to include a full review of the course materials for Communications Arts 1 because the materials had not been reviewed for several years. Review of the Communications Arts 1 reading materials also allowed the school district to address the impact of the common core requirements, including those relating to non-fiction reading materials.

The review committee consisted of 17 members, including district administrators, teachers, and staff. It held nine meetings between October 2011 and March 2012. Bunnow, as co-chair, prepared the agendas for the meetings and recorded and distributed the minutes. The review committee read approximately 93 fiction books, assessed their suitability to meet various curricular needs, and forwarded a recommended list of 23 books to the school board's programs and services committee.

In April 2012, the school board's programs and services committee adopted the recommended reading list as proposed. The school board then adopted the proposed list later that month. The meetings of the school board and its programs and services committee were both open to the public.

Krueger sued, alleging the school board and review committee violated the open-meetings law by failing to give notice of the review committee meetings and excluding the public. *See* Wis. Stat. § 19.83(1). The trial court held that, because the review committee was not created by a directive of the school board, the committee was not a "governmental body" subject to the open-meetings law.

Krueger appealed, unsuccessfully. The Court of Appeals held that the review committee was not a "governmental body" subject to the open-meetings law. *See* Wis. Stat. §§ 19.82(1), 19.83(1). The Court of Appeals also rejected Krueger's attempt to raise certain new issues on appeal.

According to Krueger, the "question here is one of delegation: May the government evade the Open Meetings Act by having administrators create committees instead of having superior governmental bodies create them directly?"

The school board says that when a committee is created by school employees in the performance of their day-to-day job responsibilities, the committee is not created by "rule or order" of the governing body.

**Wisconsin Supreme Court**
**9:45 a.m.**
**Friday, February 17, 2017**

2015AP671-CR State v. Wilson

**Supreme Court case type:** Petition for Review
**Court of Appeals:** District I
**Circuit Court:** Milwaukee County, Judge William S. Pocan, affirmed
**Long caption:** State of Wisconsin, Plaintiff-Respondent, v. Keimonte Antonie Wilson, Sr., Defendant-Appellant-PETITIONER

**Issues presented:** This case examines statutes in Wisconsin that address subpoenas. In particular, Wis. Stat. § 885.03, which specifically applies to criminal cases, provides that service of a subpoena can be accomplished by simply "leaving such copy at a witness's abode."

The Supreme Court reviews, whether a witness in a criminal case is properly served when a subpoena is left at the witness's abode, and whether trial counsel was ineffective for: (1) failing to argue that a key witness was properly subpoenaed; or in the alternative, (2) failing to properly subpoena the witness.

**Some background:** Keimonte Antonie Wilson, Sr., seeks review of a Court of Appeals' decision affirming a judgment of conviction for possession with intent to deliver between five and 15 grams of cocaine and also affirming an order denying a motion for post-conviction relief.

Milwaukee police officers said they saw a truck parked in a vacant lot with a "No Trespassing" sign. They saw Wilson exit the truck and approach a known drug house. Wilson was briefly out of the officers' sight before he walked back to the truck, so officers did not see whether Wilson had entered the house. The officers approached Wilson.

He denied having drugs or weapons on him and police say he consented to a search of his person. Wilson denies that he consented, and he said police had guns drawn as they approached. Police said they did not have guns drawn. Police found 10.65 grams of cocaine base and $449 cash. Wilson was charged with possession with intent to deliver cocaine as a second offense.

Wilson filed a suppression motion, arguing that there had been no basis for the stop and that he had not given consent to the search. The circuit court held a hearing. After officer William Savagian testified, defense counsel said he had subpoenaed Jacqueline Brown for the hearing, but she had failed to appear. Wilson contends that having Brown testify would have helped his case.

Defense counsel presented testimony from Brown's son, Darryl Roberts. After Roberts testified, defense counsel moved to adjourn in order to re-subpoena Brown. The state suggested a body attachment instead, and it objected to having Brown testify by phone. Defense counsel noted that Brown had been served by leaving the subpoena with her daughter at their residence. The circuit court reviewed the subpoena and concluded that service, a single attempt that had used substitute service, was inadequate. The court said, "[Y]ou have to attempt on a couple of occasions and make reasonable efforts before you can serve by substitute service." The court denied both the body attachment and an adjournment of the hearing.

Wilson testified at the hearing. The state presented rebuttal testimony from Savagian and officer James Hunter. The circuit court concluded there had been reasonable suspicion and that

Wilson had consented to the search, so it denied the suppression motion. Wilson subsequently pled guilty and the repeater enhancer was dropped. The circuit court imposed five years imprisonment.

Wilson filed a postconviction motion, arguing that the circuit court erroneously determined that service of the subpoena on Brown had been faulty. He also argued he received ineffective assistance of trial counsel due to counsel's failure to make an appropriate legal argument about the subpoena and/or in failing to serve Brown correctly in the first place.

The circuit court denied the motion. The Court of Appeals affirmed.

The Court of Appeals noted there is no specific criminal procedure statute that describes the subpoena process for witnesses in criminal cases.

Wilson argued that the criminal witness subpoena process was found exclusively in § 885.03, Stats., which says, "Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode."

The Court of Appeals said § 885.03 is not the only civil rule of practice dealing with subpoenas, and § 805.07(1) says that "[s]ubpoenas shall be issued and served in accordance with ch. 885." The court further noted that § 805.07(5) states, "[a] subpoena may be served in the manner provided in s. 885.03 except that substituted personal service may be made only as provided in s. 801.11(1)(b)."

While Wilson argued that § 801.11 could not apply because it refers to serving a defendant and not a witness, the Court of Appeals pointed out that § 801.11 also refers to serving a summons, not a subpoena, but the legislature incorporated the procedure by reference. Having concluded that a subpoena for a witness in a criminal case is subject to the reasonable diligence requirement of § 801.11(1)(b) before substitute service may be used, and because there was no dispute that the single attempt at serving Brown was insufficient to satisfy the due diligence standard, the Court of Appeals held that the lower court did not err when it concluded that Brown had not been properly served, nor did it err in refusing to issue a body attachment or in refusing to adjourn the motion hearing.

The Court of Appeals found that Brown's proposed testimony would not have improved the plausibility of the things the circuit court questioned, so she would not have bolstered either man's credibility.

Wilson argues that if the Legislature had wanted to impose a reasonable diligence requirement for serving subpoenas in criminal cases, it could have easily included such language in § 885.03 or, in the alternative, referenced § 801.11(1)(b) in § 885.03.

**Wisconsin Supreme Court**
**10:45 a.m.**
**Friday, February 17, 2017**

2015AP1452-CR State v. Lemberger

**Supreme Court case type:** Petition for Review
**Court of Appeals:** IV
**Circuit Court:** Dane County, Judge William E. Hanrahan, affirmed
**Long caption:** State of Wisconsin, Plaintiff-Respondent, v. Gary F. Lemberger, Defendant-Appellant-PETITIONER

**Issues presented:** The Supreme Court reviews this drunken driving case in light of recent state and U.S. Supreme Court decisions and considers whether it should expressly overrule Bolstad and Albright (full citations below). The petitioner, Gary F. Lemberger, presents the following issues to the Wisconsin Supreme Court:

- Did the state violate Lemberger's constitutional right against self-incrimination by asking the jury to infer Lemberger had a "guilty mind" because he refused a warrantless breathalyzer?
- Was defense trial counsel ineffective for failing to object to the state's comments to the jury seeking an inference of guilt from Lemberger's refusal of a warrantless breathalyzer?
- Did Lemberger forfeit his argument that the state violated his constitutional right against self-incrimination by failing to cite Bolstad and Albright (full citations below) before the circuit court, and instead relying on recent case law supporting Lemberger's position?

**Some background:** In State v. Bolstad, 124 Wis. 2d 576, 584, 370 N.W.2d 257 (1985) and State v. Albright, 98 Wis. 2d 663, 669, 298 N.W.2d 196 (Ct. App. 1980), the Wisconsin Supreme Court and the Court of Appeals respectively held that a refusal to take a breathalyzer was admissible as evidence of a "guilty mind" in a drunk-driving case because "Wisconsin drivers [had] no constitutional right to refuse" a breathalyzer. The U.S. Supreme Court and the Wisconsin Supreme Court have since held that Wisconsin drivers do have the constitutional right to refuse a breathalyzer. *See, e.g.,* Skinner v. Ry. Labor Exec. Ass 'n, 489 U.S. 602, 616-17 (1989); State v. Kennedy, 2014 WI 132, ¶5, 359 Wis. 2d 454, 856 N.W.2d 834.

In April 2014, police officers arrested Lemberger on suspicion of drunken driving following reports of his "aggressive driving." Lemberger did not perform well on field sobriety tests but refused to take a breathalyzer test. The police officers did not obtain a warrant for one and no blood test was conducted. Lemberger was charged with fourth-offense OWI and the matter proceeded to trial.

At trial, the state repeatedly argued to the jury that Lemberger's refusal to take the breathalyzer test amounted to strong evidence of his intoxication. Defense counsel did not object to the state's comments or to a jury instruction. Lemberger was convicted.

Lemberger filed a postconviction motion seeking a new trial. He argued that the state had violated his constitutional right against self-incrimination by seeking an inference of guilt from his refusal to take a breathalyzer; that violation was prejudicial enough to warrant a new trial; and that defense trial counsel was ineffective for failing to object to this.

The circuit court denied Lemberger's postconviction motion, ruling that Bolstad and Albright – which predated Skinner and State v. Banks 2010 WI App 107, ¶24, 328 Wis. 2d 766, 790 N.W.2d 526 – still governed the issue and rendered Lemberger's claim meritless. The court expressed considerable concern that Lemberger's lawyer had completely failed to cite to Bolstad and Albright, suggesting this implicated defense counsel's duty of candor to the court.

Lemberger argued that the Court of Appeals' 2010 decision in Banks, made clear that the state cannot seek an inference of guilt from a defendant's refusal of a warrantless Fourth Amendment search. 2010 WI App 107, ¶24, 328 Wis. 2d 766, 790 N.W.2d 526. Lemberger asserted that Banks was consistent with a long line of federal case law holding the same, citing United States v. Moreno, 233 F.3d 937, 940-41 (7th Cir. 2000); United States v. Dozal, 173 F.3d 787, 794 (10th Cir. 1999); United States v. Thame, 846 F.2d 200, 206-07 (3rd Cir. 1988). Lemberger then argued that, since the United States Supreme Court had held that a breathalyzer consists of a Fourth Amendment search, Banks applied to breathalyzer refusals. *See* Skinner, 489 U.S. 602, 616-17 (1989).

At the Court of Appeals, Lemberger acknowledged that both Bolstad and Albright clearly permitted an adverse inference from refusal but suggested they were both based on the (allegedly outdated) premise that Wisconsin drivers had no constitutional right to refuse a breathalyzer. He maintains that since the Court in Skinner (and this Court in State v. Kennedy, 2014 WI 132, ¶5, 359 Wis. 2d 454, 856 N.W.2d 834*)* deemed a breathalyzer a Fourth Amendment search, that premise is no longer valid.

The Court of Appeals ruled that Lemberger forfeited this argument because he had utterly failed to distinguish relevant and potentially controlling case law against this position in the circuit court.

Now, Lemberger contends that in 2014, the Wisconsin Supreme Court adopted and expanded Missouri v. McNeely, 569 U.S. __ (2013) in Kennedy, 2014 WI 132, ¶5. That same year, the Court of Appeals held that implied consent laws do not diminish individuals' constitutional rights to refuse a blood alcohol test. State v. Padley, 2014 WI App 65, ¶¶23-31, 354 Wis. 2d 545, 849 N.W.2d 867. Noting common confusion, the Padley Court explained that a driver's "implied consent" means consent to having a civil penalty imposed should the driver refuse an alcohol test. ***Id.*** at ¶24. The Padley Court made clear that this "implied consent" does not affect, and is distinct from, a driver's consent to a warrantless search.

Lemberger contends that federal and state case law now are "clearly contrary" to the premise of Bolstad, Albright and State v. Crandall, 133 Wis. 2d 251, 394 N.W.2d 905 (1986). He contends that the law now gives Wisconsin drivers the right to refuse a warrantless breathalyzer.

A decision by the Supreme Court is expected to clarify how the law may be applied in cases involving refusal to take a breathalyzer test.

**Wisconsin Supreme Court**
**1:30 p.m.**
**Friday, February 17, 2017**

2016AP275 Gabler v. Crime Victims Rights Bd.

**Supreme Court case type:** Bypass
**Circuit Court:** Eau Claire County, Judge James J. Duvall
**Long caption:** The Honorable William M. Gabler, Sr., Petitioner-Respondent, v. Crime Victims Rights Board, Respondent-Appellant, Wisconsin Department of Justice, Respondent.

**Issues presented:** The issues as posed by petitioner, Judge William M. Gabler, Sr., Eau Claire County Circuit Court:

I. Real and significant questions of state constitutional law are presented regarding the separation of powers doctrine and due process protections in Crime Victims Rights Board proceedings.
   - An executive branch agency cannot sanction a judge for a discretionary scheduling decision.
   - Judges have due process protections in Crime Victims Rights Board proceedings, regardless of the form of sanction imposed.

II. Review by this court is necessary to clarify the law concerning the scope of crime victim rights and authority of the Crime Victims Rights Board.
   - Crime victims do not have a right to demand a judge sentence a defendant on particular charges until the entire case is adjudicated.
   - The Crime Victims Rights Board is required to confirm that the Department of Justice (DOJ) Office of Crime Victim Services has mediated or sought consent to mediate crime victim complaints before it has jurisdiction.

**Some background:** This case involves a dispute between Eau Claire County Circuit Court Judge William A. Gabler Sr. and the Crime Victims' Rights Board over the timing of a sentencing in a sexual assault case. The Supreme Court examines the relationship between crime victims' rights as addressed in the Wisconsin Constitution and a trial judge's inherent authority to control how a case is handled.

Wis. Stat. § 950.09(2) provides for the board to review crime victim complaints and sanction those whom it determines violate a crime victim's rights.

The board's remedial authority includes the power to issue public or private reprimands, refer a matter to the Judicial Commission, seek equitable relief, and bring punitive forfeiture actions. Wis. Stat. § 950.09(2)(a)-(d).

The Victims Rights Amendment, Wis. Const. Art. 1, § 9m, states that the state shall ensure all crime victims have specific privileges and protections, including timely disposition of a case and reasonable protection from the accused throughout the criminal justice process.

Here, the board concluded Gabler violated a sexual assault victim's rights under state law and the state constitution to a speedy disposition by delaying the defendant's sentencing. Gabler successfully challenged the board's decision in circuit court.

The circuit court held that: (1) certain sections of Wis. Stat. § 950.09(2) unconstitutionally intrude upon the exclusive power of courts to control their dockets and the exclusive power of the Wisconsin Supreme Court to regulate and sanction the judiciary; and (2) the board committed a variety of errors, including some that violated Gabler's procedural due process rights.

The DOJ appealed. Gabler petitioned the Supreme Court for a bypass of the Court of Appeals, which the Supreme Court granted.

Gabler contends the board violated the separation of powers doctrine by sanctioning him for his discretionary scheduling decision. Gabler also asserts that the manner in which the administrative proceedings before the board were handled violated his due process rights.

The board says there is no separation of powers problem because under the state constitution, the board and the judiciary share authority to set time limits for judicial decision making, and any decisions by the board its decisions are subject to judicial review under Wis. Stat. ch. 227. The board also argues that the trial court's proposed limitations on the board's remedial powers are untenable because they would deprive crime victims of any remedy in many cases involving judges. The board also argues that it gave Gabler any legal process he was due.

**Wisconsin Supreme Court**
**9:45 a.m.**
**Tuesday, February 28, 2017**

2015AP993-CR State v. Steinhardt

**Supreme Court case type:** Petition for Review
**Court of Appeals:** II [Dist. IV judges]
**Circuit Court:** Ozaukee County, Judge Sandy A. Williams, affirmed
**Long caption:** State of Wisconsin, Plaintiff-Respondent, v. Heather L. Steinhardt, Defendant-Appellant-PETITIONER

**Issues presented:**

- Was Heather L. Steinhardt's right to be free from double jeopardy violated when she was convicted of both failure to protect a child and first-degree sexual assault of a child pursuant to Wis. Stat. §§ 948.02(3) and 948.02(1)(e)?
- Did Steinhardt relinquish her right to raise the double jeopardy issue by pleading no contest to the charges?
- In Steinhardt's postconviction claim that her trial attorney was ineffective for failing to advise her of the double jeopardy issue, did she sufficiently allege that she was prejudiced by her attorney's failure?

**Some background:** Steinhardt was convicted after entering no contest pleas to both Failure to Protect a Child from Sexual Assault and First-Degree Sexual Assault of a Child under the age of 13 as a party to a crime, and of child enticement. The charges stem from her participation in and acquiescence to the sexual assault of a 12-year-old girl by a man as Steinhardt sat by.

Steinhardt was charged with three offenses: Failure to Protect a Child from Sexual Assault, in violation Wis. Stat. § 948.02(3); First-Degree Sexual Assault of a Child under Age 13 as a Party-to-a-Crime, in violation of Wis. Stat. §§ 948.02(1)(e) and 939.05; and Child Enticement, in violation of Wis. Stat. § 948.07.

On May 13, 2014, the circuit court accepted Steinhardt's no-contest pleas to all three counts. The court found that the complaint provided a sufficient factual basis for the pleas. Steinhardt was sentenced to 22.5 years initial incarceration (IC) followed by 15 years extended supervision (ES), as follows: count one: 12.5 years (7.5 years IC, 5 years ES); count two: 25 years (15 years IC, 10 years ES); and count three: 25 years (15 years IC, 10 years ES). Counts two and three were ordered to run concurrent to each other, but consecutive to count 1.

In post-conviction proceedings, Steinhardt claimed the two charges were multiplicitous and that counsel was ineffective for not so advising her and that she was entitled to plea withdrawal. The circuit court conducted an evidentiary hearing and ruled that Counts one and two were not multiplicitous. The court accepted an offer of proof that Steinhardt's trial attorney had not recognized the multiplicity issue and therefore had no strategic reason for not advising Steinhardt about that issue. The court then denied her ineffective assistance of counsel claim, based on its finding that the charges were not multiplicitous.

Steinhardt maintains that under the clear language of § 939.66, she cannot be convicted of a crime "which is a less serious or equally serious violation under s. 948.02 than the one charged." The failure to act offense under § 948.02(3) is a Class F felony and it is a less serious

type of violation than first-degree sexual assault, which is a Class A or B felony, depending on circumstances. *See* § 939.66 (2p).

Steinhardt thus contends that under the clear language of § 939.66, conviction of both offenses is not permitted, at least when the acts or omissions occurred at the same time and are of the same nature.

On appeal, the state conceded that the same criminal act cannot support more than one charge under Wis. Stat. § 948.02 because Wis. Stat. § 948.66(2p) provides that any violation of § 948.02 is an included offense of any other less or equally serious violation of § 948.02. Slip op. at ¶7.

However, the Court of Appeals ruled that by pleading no-contest, Steinhardt relinquished her right to direct review of her double jeopardy claim, citing State v. Kelty, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886. With respect to Steinhardt's alternate claim (that her attorney was ineffective for failing to advise her of a double jeopardy issue), the court found her proffered testimony to be conclusory such that she failed to properly allege prejudice and denied the claim on that basis.

In Kelty, the Wisconsin Supreme Court held that, in general, a plea waives one's right to raise a double jeopardy violation, but a plea does not waive a double jeopardy claim if the claim can be resolved "on the record as it existed at the time the defendant pled." Kelty at ¶38. Here, the parties disputed whether the record here permits this exception.

The Court of Appeals reasoned that Steinhardt's multiplicity claim could not be resolved based solely on the allegations made in the criminal complaint.

Steinhardt maintains that her double jeopardy claim can be resolved by facts that were on the record at the time of her plea. She also challenges the ruling that she failed to adequately allege prejudice, contending that is an unreasonable standard because obviously she was prejudiced if she pled unknowingly to multiplicitous claims.

The state notes that each of these crimes requires proof of a fact that the other does not. The state points to Blockburger v. United States, 284 U.S. 299, 304 (1932), which holds that a "single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

A decision by the Supreme Court would clarify how a double-jeopardy claim applies to the circumstances presented in this case.

**Wisconsin Supreme Court**
**10:45 a.m.**
**Tuesday, February 28, 2017**

2015AP1782-CR State v. Pal

**Supreme Court case type:** Petition for Review
**Court of Appeals:** IV
**Circuit Court:** Rock County, Judge Richard T. Werner, affirmed
**Long caption:** State of Wisconsin,Plaintiff-Respondent,v. Sambath Pal, Defendant-Appellant-PETITIONER.

**Issue presented:** Whether Sambath Pal was properly convicted of two counts of leaving the scene of an accident causing death.

**Some background:** Sambath Pal was involved in a motor vehicle accident in which he struck two motorcyclists, causing their deaths; he then left the scene. He was apprehended and pled guilty to two counts of hit and run involving death pursuant to Wis. Stat. § 346.67(1), arising from Wis. Stat. § 346.74(5)(d) (classifying hit and run involving death as a Class D felony).

Pal faced a maximum term of 15 years of initial confinement and 10 years of extended supervision on each count. *See* Wis. Stat. § 973.01(2)(b)4. and (d)3. The circuit court sentenced Pal to 10 years of initial confinement and 10 years of extended supervision on each count, to be served consecutively. He appealed and the Court of Appeals summarily affirmed.

Pal argues that it was multiplicitous, in violation of his constitutional protection against double jeopardy, for the state to charge him with two counts of hit and run for a single act of flight from the accident scene. *See generally* U.S. Const. amend. V.

In State v. Hartnek, 146 Wis. 2d 188, 430 N.W.2d 361 (Ct. App. 1988), the Court of Appeals ruled that a single event of failing to stop and render aid may give rise to multiple charges when there are multiple victims. The Court of Appeals thus declined Pal's invitation to reverse Hartnek, citing Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), which provides that only the Supreme Court has the power to overrule, modify or withdraw language from a published opinion of the Court of Appeals.

Pal now asks the Supreme Court to reverse Hartnek because, since that case was decided, "numerous other jurisdictions, analyzing statutory language identical in relevant part to that for the State of Wisconsin, have concluded a criminal defendant can only be convicted of leaving the scene of the same accident once."

Pal is critical of the reasoning in Hartnek. He says the penalty section does not determine the number of violations of § 346.67; it sets the level of punishment.

In Hartnek, a defendant pled no contest to two counts of hit and run, after he struck two vehicles while driving and then fled the scene. 146 Wis. 2d at 191. The Court of Appeals interpreted the statute in effect at the time, § 346.67 and its penalty section counterpart, § 346.74(5).

Pal asserts that, applying the four-part Tappa analysis [State v. Tappa, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985)] to the applicable statutory scheme, "it is apparent only one offense can be charged when one leaves the scene of an accident defined in § 346.67, regardless of the number of victims in the accident."

The court noted that multiple injury accidents are not rare and the Legislature could have made it clear that only one penalty per accident could be imposed if it had intended to do so. The court concluded that several of the penalty sections could be invoked in a single accident.

Among the cases Pal cites is State v. Stone, 728 S.E.2d. 155 (2012), where the West Virginia Supreme Court addressed a nearly identical issue. In Stone, a defendant was in an accident that led to the death of five persons. He was convicted of five counts. On appeal, the court, interpreting a similar law, applied the rule of leniency, and interpreted the West Virginia Code §17C-4-1 "to mean that a driver of a vehicle involved in an accident resulting in injury or death may be punished only once for leaving the accident scene regardless of the number of injuries or death resulting therefrom."

A decision by the Supreme Court could determine whether a single event of failing to stop and render aid following an automobile accident may give rise to multiple violations of sec. 346.67, Stats., when there are multiple victims.

**Wisconsin Supreme Court**
**1:30 p.m.**
**Tuesday, February 28, 2017**

2015AP1493 The Segregated Acct. of Ambac Assur. Corp. v. Countrywide Home Loans, Inc.

**Supreme Court case type:** Petition for Review
**Court of Appeals:** District IV
**Circuit Court:** Dane County, Judge Peter Anderson, reversed and cause remanded
**Long caption:** The Segregated Account of Ambac Assurance Corporation (the "Segregated Account") and Ambac Assurance Corporation ("Ambac"), Plaintiffs-Appellants-RESPONDENTS, v. Countrywide Home Loans, Inc., Defendant-Respondent-PETITIONER

**Issues presented:**

- Does a foreign corporation's appointment of an agent to receive service of process in Wisconsin, as required by Wis. Stat. § 180.1507 when registering to do business here, without more, constitute consent to the general jurisdiction of the Wisconsin courts?
- Would requiring a foreign corporation to consent to general jurisdiction of the Wisconsin courts as a condition of doing business in the state violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution?

**Some background:** Ambac is a Wisconsin-domiciled stock insurance corporation with its principal place of business in New York. Countrywide is a New York corporation with its principal executive offices in California. Countrywide originated mortgage loans.

In 2005, Ambac issued policies insuring against losses resulting from residential mortgage-backed securities, based on representations made by Countrywide to Ambac during 2004-05 regarding Countrywide's mortgage origination practices. Ambac is obligated to make more than $350,000,000 in claims payments.

The Segregated Account was established in 2010, under a plan approved by the Wisconsin Commissioner of Insurance. Ambac allocated the insurance policies to the Segregated Account. A circuit court placed the Segregated Account into statutory rehabilitation. The rehabilitation proceedings were pending in Dane County Circuit Court at the time the complaint in this action was filed.

After the housing market collapsed, Ambac filed multiple lawsuits, including four against Countrywide, seeking to hold the security issuers, underwriters, and originators liable for the risks Ambac insured against. All lawsuits except for this one were brought in New York courts.

In 2014, Ambac filed a fraud case in Wisconsin arising out of five residential-backed securities securitizations that originated in 2005. Ambac filed a nearly identical suit in New York, apparently to preserve its rights in the event the Wisconsin case was dismissed. The New York case is apparently stayed pending this litigation.

Countrywide moved to dismiss the Wisconsin suit arguing, among other things, that no basis existed for personal jurisdiction over Countrywide in Wisconsin. Following oral argument, the circuit court dismissed the suit for lack of personal jurisdiction over Countrywide. The circuit court concluded that Countrywide did not consent to general jurisdiction in Wisconsin by appointing a registered agent for service of process; Countrywide did not consent to general jurisdiction by appearing in the rehabilitation; and Countrywide is not subject to specific jurisdiction because Ambac's alleged injury occurred in New York.

In reaching its decision, the circuit court relied in large part on Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

The Court of Appeals reversed and remanded. The appellate court noted that a foreign corporation "authorized to transact business in this state shall continuously maintain in this state a registered office and registered agent." § 180.1507, Stats. The court said it was undisputed that, although Countrywide was not incorporated in Wisconsin and did not maintain a principal place of business here, it had a designated Wisconsin agent for service of process during the pertinent time periods. The Court of Appeals agreed with Ambac that by maintaining a Wisconsin agent to receive service of process during the pertinent time periods, Countrywide subjected itself to the general jurisdiction of Wisconsin courts and actually consented to personal jurisdiction. The Court of Appeals said this result was dictated by two prior decisions.

First, the appellate court pointed to Punke v. Brody, 17 Wis. 2d 9, 115 N.W.2d 601 (1962), in which this court addressed the plaintiff's argument that service on an agent for the defendant was sufficient because the defendant had conferred authority to accept service on the agent, which "is essentially a claim that [the defendant] consented to the exercise of jurisdiction by Wisconsin courts." Id. at 13.

The second case cited by the Court of Appeals was Hasley v. Black, Sivalls & Bryson, Inc., 70 Wis. 2d 562, 235 N.W.2d 446 (1975). After concluding that the defendant was "within the reach of" the long-arm statute and had received adequate notice through service of process, the Hasley court turned to due process concerns. The Hasley court noted that International Shoe Co. v. Washington Office of Unemployment Comp. and Placement, 326 U.S. 310 (1945), requires certain minimum contacts between the defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Countrywide argues that the question of whether a foreign corporation's appointment of an agent to receive service of process constitutes consent to general jurisdiction even if the corporation has no other ties to Wisconsin implicates federal constitutional law.

Countrywide further notes that the Daimler Court said, "A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." 134 S. Ct. 773 n.20.

Countrywide says in 2015 alone, there were more than 3,500 foreign businesses that newly registered to do business in Wisconsin in order to sell goods or services here. Countrywide says it is not supportable to think that each of those foreign corporations consented to be brought to court in Wisconsin for any action that occurs in any state, regardless of the connection to Wisconsin, yet that is the conclusion of the Court of Appeals' holding.

Ambac argues it is well established that appointment of an in-state agent for service of process is a valid method of establishing consent to jurisdiction. Ambac contends that Countrywide misreads Daimler, which has nothing to do with consent based exercises of personal jurisdiction and cannot be read as upending nearly a century of jurisprudence.